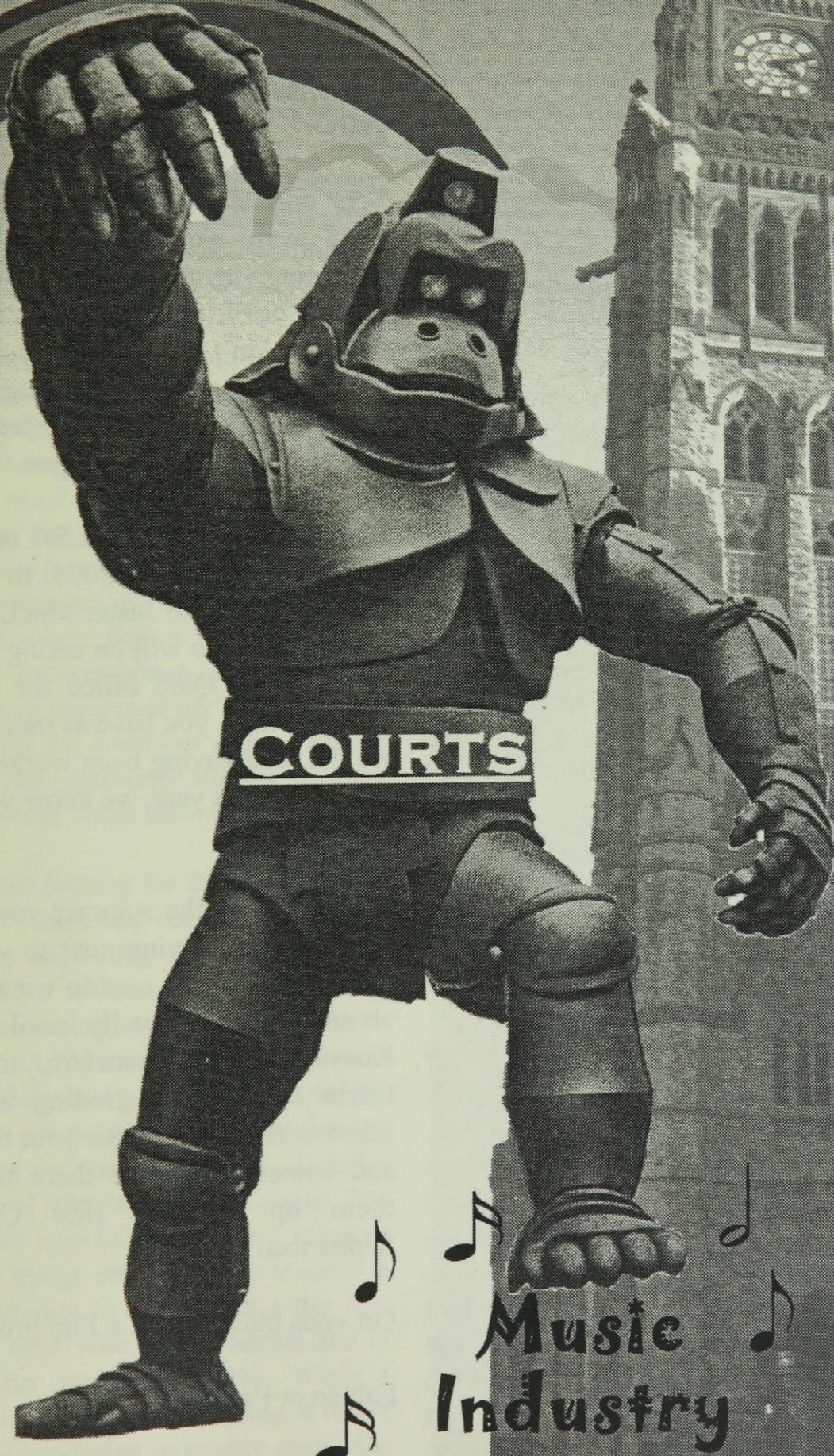


The Final Issue

Quid Novi

McGill University, Faculty of Law
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Aram Ryu
April 2, 2004

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Editor's Note...

So this is it, faithful readers: the last Quid of the year.

C'est ce moment larmoyant où il nous faut remercier tous ceux qui l'ont rendu possible. D'abord vous, nos contributeurs, qui nous avez offerts des articles uniques. Construction et destruction de murs, déclarations d'amour ou de guerre à Falardeau, questions environnementales, de diversité, ou de systèmes de notation, les sujets ont été variés, et c'est grâce à vous.

Very special thanks also to the entire Quid team: assistant editors-in-chief, managing, layout, associate and web editors, cover artists, without you, the Quid couldn't exist. Putting together a 16-page magazine every single week requires a lot of work and dedication, and you guys made it happen.

We wish the incoming LSA and Quid teams a fruitful 2004-2005. In particular, all the best to Jason MacLean and Aram Ryu, who will be taking up residence at the Quid office for its 25th year. We hope you have as much fun as we did, and having been working with you in the past year, we know you'll do a terrific job.

Lastly, if over the summer you realise that the person lying next to you in a hammock really couldn't care less about how profoundly cool Justice Konrad von Finckenstein, transsystemia or pass/fail grading are, our inbox is ready to receive your thoughts and someone will be there to brush them up for the first Quid in September.

On vous dit merci, et à l'an prochain!

Fabien et Patrick

All the Wrong Places

by Natasha Himer (Law II)

I spent most of my first year in law school talking to myself. It went something like this, "Why am I here?" Most of that time I didn't find an answer, and when I did, I had lost it the very next day. I looked for answers where there were none. I longed for reason, for purpose, for meaning. I had one expectation; I seemed to believe that I had a 'raison d'etre' and I thought that if I just searched in the right places, and if I just concentrated my efforts I would eventually find it – I didn't think it would be easy, but I thought it was possible.

I struggled with this question more than I needed to, and a friend shared the following with me; "*You are so young, so before all beginning, and I want to beg you, as much as I can, to be patient toward all that is unsolved in your head and to try to love the questions themselves like locked rooms and like books that are written in a very foreign tongue. Do not now seek answers, which cannot be given you because you would not be able to live them. Live the questions now. Perhaps you will then gradually without noticing it, live a long some distant day into the answer.*"

I am not looking for the answers anymore, but I can't help but feel like I stumbled onto something that feels like an answer, like a reason, like something worth mentioning. It may seem self-evident to most, but I wasn't able to appreciate it as fully as I am now. It is simply this: there are people here, in our faculty, who make me want to be here. Being a member of the Women's Caucus has opened my eyes to that one fact. One of the great things about being a student is the opportunity to learn from other students, to work with other students and to watch other students at work. While a classroom is a forum for learning, it won't always be conducive to peer-to-peer edu-

cation. A student group, however, can be one of the richest and most organic learning environments. This year has been a year of 'transition' for the Women's Caucus. The continuous turnover in the student population certainly makes it a challenge to maintain the cohesion and structure of a student group. But, at the same time, the constant flow, the mix of fresh and ripe energy, can be the product of some very creative and exciting initiatives. I have truly been inspired by my fellow students and I think you can be too. Whether it is the Women's Caucus, or any other student group, I suggest you join one and you might just find something you are looking for.

In early March, sixteen members of the Women's Caucus attended the 48th session of the Commission on the Status of Women, at the United Nations, in New York. Our members were accredited by Canadian NGOs; Rights and Democracy, The Canadian Human Rights Foundation, Voices of Women, and the Canadian HIV/AIDS Legal Network. The trip was sponsored in part by the Law Students

Association, The Faculty of Law and the Center For Developing Areas Studies. As delegates, observers and lobbyists, each of us attended NGO side events, state-to-state negotiations and other expert group side panels. By combining our efforts we were able to gain access to a high-level international policy making forum; we were able to bridge the gap between the student and professional worlds and we were able to forge links with activists, policymakers and other supporters of the International Women's Movement. We strongly believe that it is important for young women to become involved in the Women's Movement at an earlier stage so that we can continue it in the future.

For those of you interested in the work of the Women's Caucus, we hope you join us next year, and we welcome you in advance! We hope to increase our presence at the faculty next year, with more planned events and activities. Your participation is what will make our faculty a truly vibrant and enriching environment! ■

Bye Bye Legal Meth!

by Mariam S. Pal (Law II)

Not too long from now, assuming that I pass my exams, I will be a third year law student. There are number of advantages to being in third year. I will be almost finished law school; I will finally get a locker big enough to accommodate both my winter coat and my lunch and best of all it will be bye bye to Legal Meth! Oh yes I know that just like going to the dentist Legal Meth is good for me. In addition to learning about all sorts of outrageously priced legal software and atoning for my legal writings sins I can now brag that I have a factum and a moot under my belt. I suppose I learned something from two years of Legal Meth but overall I have to say I'm disappointed. After hearing me gripe and grouch for the umpteenth time one of my friends suggested that maybe I should write an article for the *Quid*. So, without further ado here are some modest and hopefully constructive suggestions on how I think the second year course could be improved. ▶

Compulsory attendance: What is the point?

Personally, I find the mandatory attendance at Legal Meth rather absurd and downright insulting. I quit a good job to come to law school and I don't need to be told to go to class if I were still in elementary school. I'm one of those people who generally go to class unless of course a lot of the material is something I can simply cover on my own. While in first year, it could be argued that attending Legal Meth has its virtues; by second year is a downright pain in the you-know-what. This leads into my next point.

Unnecessary assignments: I have better things to do

In second year Legal Meth we had six assignments, the persuasive writing exercise [I believe the official name was written advocacy] and of course the factum and the moot. Fully half of the assignments revisited search tools we had learned in first year. I don't see why we needed to do them again. In the other

half, we were supposed to learn new tools. A friend and I did most of the assignments on Google just to see if it was possible. Surprise! We passed them all and found the answers for free. I think this is a pretty good accomplishment considering the cost of legal search engines and that only a few of us will end up working for blue ribbon firms for wealthy clients who can fund endless hours on Lexis Nexus. For the most part, we were able to figure out the answers ourselves and when we did use the recommended legal databases we simply consulted the guidelines posted on Web CT. So when we went to class, for the most part, we had already done the assignments. There I was, sitting at the back of class, surfing EBay, my assignment completed. But since attendance was compulsory I had to go. Not only did I get my assignments I even won a couple of auctions I bid on EBay during class. As for the persuasive writing exercise please, don't get me started.....

Clearer communication – use WebCT!!

No matter how much one is prepared for the factum exercise, there is no doubt it takes time and is stressful. Some clear communication before, during, and after this exercise would have made the whole process easier for all of us. For example, the course syllabus announced a February 16 workshop on mooting, time to be confirmed. Well, the time was never confirmed. Coming out of a class that day at 12:25, I learned that this workshop was being held across the hall. Would it have been too difficult to have sent out an e-mail to all students reminding them of this workshop? Similarly, better use could have been made of WebCT to announce all sorts of useful information such as the procedure to get our opponents' factum, to post a list of moots and announcing when, how, and where our facta would be returned to us. I'm rather sure that I'm not the only person who felt the lack of communication only made things confusing and caused unnecessary frustration, not to mention irritation. ►

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Timing of the factum and moot could be improved

Simply put, timing is everything and in the case of the timing of the factum and moot, well, it could have been a lot better. Some of us, including myself, actually took a lighter course load in the first term anticipating the factum/moot process. Arguments can certainly be made that it would be easier no matter which term the process takes place in that the earlier would be the better. Why not have the entire process finished before Reading Week? This would certainly be a lot easier on all of the people who were preparing for moots and interviewing for the Montreal recruitment on top of all of their

regular work. Law school is stressful enough, what is the point of adding more stress when it is possible to do otherwise?

Why not let grad students be T. L.s?

I understand that at some other law schools, Legal Methodology is taught by graduate students. One of the advantages of this is that many of them may have already worked in a law firm. Why doesn't McGill consider this? And while I'm on the subject of T.L.s, here's a message for next year's group. When you're answering questions about the factum on WebCT try to remember that it was only a year ago that you were in exactly the same situation!

My suggestions

In conclusion, my main suggestion would be that second year Legal Methodology comprises exclusively of the factum and moot exercises. Just leave all those assignments in first year please. WebCT should be used as an efficient and widely accessible way to communicate all matters relating to the course to students. And please, let's get this over with either early in the first or second term of second year. Then we can say bye bye Legal Methodology... ■

LSA Year in Review

by Pascal Zamprelli (LSA President)

Well, folks, another year has come and gone, and we're all a little older, a little wiser, and a little closer to losing our minds. Insanity notwithstanding, I had a pretty good time.

After kicking things off with style at Orientation, it was time for this new 500 member family to get to know each other, and time for us to get to work. An early positive note was the favorable firm response to a new sponsorship system that asked any firm sponsoring a big-ticket event (i.e. Coffee House, Skit Nite) to pledge at least \$500 to the Social Justice Bursary or a human rights initiative. Result? More money. Yeah!

Of course, those Coffee Houses not sponsored by firms are hosted by one of the many LSA clubs that have strived to make student life more enjoyable. Remember, the LSA helps fund these clubs with your money, so it's worth checking them out next year if you haven't already. Clubs have been responsible for events such as MELSA's Art Show.

Speaking of your cash, we're pleased to have been able to allocate funds to some extremely worthy causes and events this year. Aside from the Clubs budget,

LSA funds were given to the Latin American Law Students' Association for their very successful symposium, to the Women's Caucus for a U.N. conference in New York, to the Canadian Contemporary Issues Club and Outlaw to bring in speakers, and to Actus Reus who recently staged *Proof*. Money also went to the Human Rights Working Group, The McGill Entertainment Law Students Association, The International Law Society, and the Jewish Law Students' Association, to name a few. Many of these events were great successes, so next year remember that any group of LSA members (that's all of us) can apply for special funding and should do so if there is a worthy cause.

On the academic front, your Faculty Councilors won a battle that had gone on for years in finally convincing our professors to allow us to take any out-of-faculty courses we like, including language courses. Furthermore, credits were increased for our tireless Law Journal staff, and our professors finally achieved enlightenment with respect to double sided printing. Also, don't be surprised next year if coursepacks are cheaper and library hours are longer.

While this year has seen a few publicized financial blunders, at the end of the day money was managed very well overall. Unexpected surpluses in a few areas and sound fiscal management allow for a rosy picture now – good news for next year. That being said, we are in the process of figuring out just how much McGill will in fact ask of the large sum of money we owe them as a result of the disastrous LSA bookstore venture, which thankfully was taken off life support last year. All in all, however, the LSA's current financial footing is strong. For detailed information, please refer to the final Financial Report, to be presented at our Annual General Meeting on April 8. All of you are emphatically encouraged to attend this very important final meeting, where all members in attendance have a vote.

With respect to issues such as the bookstore, we are realizing in fact that one major challenge for the LSA will be to refocus its efforts towards decision-making, and away from burdensome administrative tasks, as the bookstore proved to be in the past, and as the computer network, for example, proves to be today. This is why we are planning to transfer much of the administration of the network to the Faculty staff, while maintaining effective student input into the decision making process. This will allow us to make much better use of our time and resources. Oh, and by the way, there will be a bunch of new computers ►

adorning our labs next year. Hooray!

Perhaps most importantly, we all strove to counter-balance school and work schedules with a little fun. I've shared many a drink and a laugh with some of you over one of our many Coffee-Houses, on the boat cruise, at Law Games, at that great First Year party, or after some hard fought intramural battle. If you haven't had any fun, there's still time! Ask me about our end of the year bash, currently in the works.

Well those are some of what I feel are the highlights from this past year. What

I've realized in doing this job is that for all the grand plans in the world, what really matters is solving people's problems every day, and making sure they're smiling at least sometimes. As you can see, the LSA is involved in many facets of your life at the faculty, and ultimately affects how good a year you have. Hopefully, the LSA was able to help you out or at least make your stay a little more enjoyable this year. If not, then get upset because that was our job. Or better yet, get involved yourself and help change things for the better.

On that note, I thank you all for a wonderful year, and wish the incoming LSA all the best. They are a very competent and enthusiastic bunch, which is great news for all of us who will be roaming these halls next year.

If you need any more information on the LSA feel free to ask any Council member or just find me wandering around. Thankfully, it looks as though we've managed to convince the McGill administration that Pino's is worth keeping around for now, so we'll have a coffee and chat. Until then, take care. ■

The Bible Meets the Basement

by Toby Moneit (Law III)

Those of you who haven't seen much of me this year may have wondered where I am. Yes, it is true—I have practically taken up residence in the basement of 3661 Peel. Now that my tenure at the Journal is coming to a close, I feel that it is time to get some things off my chest. Well, okay, one thing: the basement of 3661 Peel is ABSOLUTELY DISGUSTING!

Now I know that it is somewhat insensitive of me to complain when so many law clubs don't have adequate funding, let alone space. Hell, the LSA itself barely has room to breathe and regularly has to battle with bugs and other basement creepy-crawlers. I am the first to admit that we are, in many ways, spoiled and that it is not good etiquette to whine. But when you spend most of your waking hours in one place, you get to learn about it—both from the people around you, and mostly just by being there. While I am focusing on the Journal offices, I am sure that my experiences in the basement of 3661 Peel are representative of what happens in other law basements (like, say, the basement of Old Chancellor Day Hall).

Where to begin? I guess at the beginning, May 2003, when the executive of volume 49 moved into the Journal offices. Discovery number 1: ants EVERYWHERE! Don't bother calling

the McGill bug guy, though, he just comes in, sprays some toxic chemicals around the place and waits for us to call him back in a few weeks. He doesn't get to the root of the problem. So we bought ant traps and watched the worker ants, in their state of near automatism go after the sweet caramel held in the deceptive white plastic exteriors.

By the time we figured out this trick, it was moving into the school year, the ants must have frozen—no more ant problem, for a while anyway. Then came the deep freeze. The side door was stuck shut. The McGill electricians came by, opened the door with ease and laughed at us heartily. What they didn't realize was that by the time they got to us, it was always afternoon. By then, the sun had been shining on the door for several hours causing it to unfreeze. But, in the morning and at night, if you're in, you're locked in and if you're out, you're locked out.

Next was the ceiling in the women's bathroom—it has been caving in since the beginning of time. I thought I might speed up its repair by mentioning how dangerous this is (nothing like potential liability to get people moving). In order to make the bathroom less dangerous, the McGill facilities people took down the ceiling plaster and exposed the wooden beams. While they were at it, they also

left the electrical box hanging. This meant that we all had to use the men's bathroom for the next several weeks. Now that the imminent danger is out of the way (after another trip from our friendly McGill electricians), they figure they can leave the ceiling like that indefinitely. So each day, we have a new guest that drops down from the ceiling in a pile of dust—right onto the counter by the sink. First it was a worm and most recently, it was a beetle. I seriously doubt that they know how to edit footnotes.

After the bathroom there were the shelves. I came in during the winter break to find all our old issues in a tired heap on the floor. It was like our storage closet had thrown up law journals (which is how I sometimes feel myself so I can understand). After clearing out the mess, we ordered new shelves. The McGill carpenters showed up two months later—unannounced—and proceeded to measure the space without asking us what we planned to put in there or what we thought we needed.

To keep things exciting, there have also been a few explosions. The first was a popping noise followed by foul-smelling smoke coming out of one of our computers. The McGill computer guys told us this was normal. Next, our kettle literally exploded in the hands of one ▶

of the Journal members. And, a few weeks ago, the kitchen sink exploded into the office of our neighbours at the Quid. But, not where the valves are. No, that would be too obvious. The water rushed in through an elusive hole in the wall. The McGill plumbing people temporarily plugged the hole and got under the sink to "fix" the pipes. And that is when the tar erupted into the sink—I shudder at the thought of that stuff mixed into our drinking water.

Finally, this past week as we placed all the fallen issues onto the new (though not so steady) shelves, I had to fight off the silverfish that crawled out from between the journals. It was around then that my

finger had started to swell. I believe the throbbing was caused by a bug bite acquired when I had swept the floor the day earlier.

And what of the ants? Well, you can never quite get rid of them. They reappeared at the start of winter when the whole building was freezing. According to the facilities people, the furnace couldn't be turned on because it was filled with ants. And then they reappeared again a few weeks ago when it started to get nice out. But then the short cold snap we had last week punished them for leaving the walls too early and I was greeted by the sight of dead ants covering the floor. In fact, that is what I was trying to sweep up

when I got my unidentifiable bug bite. Now that it is getting warmer again, I fully expect to be communing with the ants in no time.

I don't know what spurred me onto writing this article. Maybe it's that Passover is coming. I know that when I sit with my family, and we read the story of Passover, I will have to hold myself back from changing some of the words. Rather than blood, frogs, hail, and locusts, I will be tempted to recount of hypothermia, worms, silverfish, floods, electric shock, spiders, unidentified smells, intense heat, unbreathable air, and ANTS! ■

Ratio Decidendi: *Re The Students v. The Status Quo (Part VI)*

by John Haffner and Jason MacLean (Law I)

We want to take this opportunity to thank all those who considered the petition to replace the letter-grading system with a "Distinction-Pass-Fail" regime. Over 300 students have signed the petition, clear evidence of a broad level of support for assessment reform.

We would also like to thank the many individuals who generously volunteered their time, their insights, and their moral support to this project, equally clear evidence of the broad level of collegiality at McGill Law. Whatever the fate of this initiative, McGill Law is a tremendously exciting place to be. We feel incredibly fortunate and privileged just to be here.

Part of the excitement of McGill Law, of course, is its innovative character. To adapt Oliver Wendell Holmes' famous epigram, legal education should be stable,

but it should never stand still.

Innovative change is everywhere afoot in the Faculty. Beginning with the appointment of Dean Kasirer in the fall semester and continuing both with the election of Michael Hazan as LSA

truly trans-systemic legal education - the abolition of grades and invidious ranking.

We additionally intend to continue researching the institutional and financial viability of grading (and wider curricular) reform over the rapidly approaching sum-

To adapt Oliver Wendell Holmes' famous epigram, legal education should be stable, but it should never stand still.

President and the beginnings of several exciting student initiatives (about which we are sure to hear more in the near future), the time is ripe to begin fulfilling our natural obligation to contribute to the Faculty, to leave it a little better than we found it.

To that end, our next step is to consult with Dean Kasirer and LSA president-elect Michael Hazan concerning the first crucial step toward the development of a

mer months. We believe that grading reform is not something that has to be sold to the wider legal community but is an opportunity to bolster our standing in the legal world. We'll update you on where the process stands and what needs to be done next in September.

Which leaves...ah yes, exams. We wish everyone the very best of success! Bon courage! ■

**As always, we welcome your musings over the summer at
quid.law@mcgill.ca**

Obiter Dicta: The Year in Review Edition

by Jason MacLean (Law I)

Wrapping life up in reified, compartmentalized packages such as years, new years, first years, last years, another years, years in review I have never found all that congenial a way of representing experience.

If, then, I am to bracket "our year," I'll do so by using the metaphor consciously and directly by describing a number of mostly open parentheses that speak, I think, to the shape and spirit of my experience thus far at McGill Law. I hope what follows will resonate with many of your experiences, too.

1. First and foremost, there is the unprecedented esprit de corps at McGill Law. For all the talk of change, of reform, of renewal, I would be greatly dismayed if anyone was of the mistaken view that I am anything but thrilled - and honoured - to be at McGill Law. Never before have I been surrounded by a group of such accomplished, brilliant, funny, and generous human beings.

2. As a parenthetical clause of McGill Law's esprit de corps, I want to salute especially the members of my Foundations tutorial group for collectively constructing such an enjoyable, edifying space in which to think about law, law school, and just about everything else that came to mind. So here's to you Cristina Birks, Daniel Ehrenfeld, Naomi Kikoler, Carolyn Nguyen, Jordan Topp, Adam Zanna (TL), and Aleks Zivanovic.

I could easily go on and write additional parenthetical clauses in this vein, but followed to its logical, inevitable conclusion, the end result would look a lot like a reproduction of the Bottin.

3. That said, I want to express my appreciation for the contributions of Professor Tetley to the Quid Novi, contrib-

butions which a friend of mine described aptly as "a gift" to the Faculty. Professor Tetley's contributions (about Pierre Trudeau, about his own legal practice, about the great individuals who have graced McGill with their presence) constitute a living, breathing, and vital institutional memory. When I read Professor Tetley's engaging, finely crafted articles I feel a sense of connection to a great, storied past, and in feeling this I know I am

remaining onboard together instead of fighting over who gets the biggest dinghy.

6. Speaking of trans-systemia, I must bring to your attention the ongoing undefeated streak of that formidable hockey club known as Force Majeure / Superior Force. We have lost but one contest together, our very first, and that was a way back on October 2nd, 2003. At this writing, we have been undefeated for 184 days. Frankly speaking, I cannot imagine

Taxonomically, we need to be lumpers, not splitters. The good ship Trans-Systemia must begin negotiating uncharted political, financial, and philosophical currents. Better we do so by remaining onboard together instead of fighting over who gets the biggest dinghy.

not alone. Thank you Professor Tetley.

4. A few more words of personal thanks. First, many thanks to RoN Narine for doing a thankless job. Second, to Jean, Pino, and Matteo for all the warm smiles, friendly banter, and the best breakfast deal in Montréal. Thanks too for showing what a little collective action can accomplish.

5. On the collective action tip, I'd like to open a prematurely closed parenthetical clause. There is a sense that particular initiatives for change are mutually exclusive, that issues must compete with one another at the Faculty as they do in politics. I submit this is not only unnecessary but misguided. Curricular reform does not necessarily depend upon or cancel out funding reform. Taxonomically, we need to be lumpers, not splitters. The good ship Trans-Systemia must begin negotiating uncharted political, financial, and philosophical currents. Better we do so by

us losing a game ever again. Seriously.

Of course winning entails losing. My condolences to our juridical D-league brethren Overruled (a deliciously ironic name, it turns out), whom we blanked twice in dispatching them on our way to vainglorious D-league supremacy. Look for the new and improved Superior Force Majeure squad next year as we instill terror in the hearts of our new opponents in B-league. That means you, Chico Resch!

7. Mooting was a trip. Mr. Justice Ian Binnie says that being in court is a lot of fun. So is pretending to be.

8. I expressed earlier in these pages my surprise upon discovering my own civilian leanings. Similarly, I have since then began to find the subject of civil law property more and more fascinating. For those who may be interested, I have discussed the idea of a kind of walking legal tour of downtown Montréal with Professor Godin, who has generously ▶

(*obiter dicta cont'd*)

agreed in principle. Professor Godin has in his extensive legal practice played a significant role in the re-shaping of downtown Montréal over the last thirty or so years. Details remain to be worked out, but if you are interested in looking at Montréal through the legal lens of civil law property, e-mail me (jason.maclean@mail.mcgill.ca). It promises to be a tour like no other you have ever experienced!

9. Which brings me to these pages, to the Quid Novi. I have personally had a great time writing this column and discussing it with so many of you; I think I have met more people through writing this column than any other activity I have engaged in at McGill Law. So thanks to you, my readers (God bless all six of you!).

Thanks, too, to the Quid Novi editorial board and staff for all your (mostly thankless) dedication and work in bringing the Quid to us week after week. And

thanks in particular to Fabien Fourmanoit, Rosalie-Anne Tichoux-Mandich, Carinne Hébert-Sabourin, Michael Hazan, Patrick Gervais, and Michelle Dean for their editorial advice and personal support.

10. Let's hope that this last parenthetical clause is one that we can close happily in the not-too-distant future. Meanwhile, in the spirit of Michel de Certeau's notion of bricolage, of making do, let's attempt to rethink the experience of exams. A cultural bricoleur, for de Certeau, was one who slyly subverted and reassembled forms of knowledge and the power relations attendant to them. Then again, jaywalking for de Certeau was something of a heroic act, and his model was Manhattan (where drivers fear pedestrians, who are more accurately styled as bands of roving nomads), not Paris, let alone Montréal, let alone Peel and Penfield.

Take, then, the American novelist Don DeLillo, who in response to the perennially banal question "why do you write?" answered "To find out what I know." Now

that may at first blush sound a touch trite, a little too neat, yet I think it captures nonetheless the pleasure of knowing things, the excitement of learning things, and the sense of enormous satisfaction that attends the realization of our own nascent understanding.

I experienced this the other day when asked by a good friend (whom I do not see enough) what I thought about the Charter. This is not to claim any brilliance for my response but to share with you the feeling of satisfaction that accompanied my realization that I not only had an answer at the ready - that is, a way of thinking about and through the Charter - but that my answer was a reasonably coherent, reasonably workable way of thinking.

And this is how I have been thinking about our impending exams. Studying for and, not least, writing our law exams is, among other things, an opportunity to reassemble what we have experienced thus far into something we know, something that is our own. And so it goes. ■

Maritime Law Exam Question Gets Second Life

by Fabien Fourmanoit, for the Quid

So McGill Law exams don't just make great birdcage lining: they are also being used in courts all over Europe.

"What are the legal consequences under the Hague/Visby Rules of the shipper packing and sealing the carrier's container and delivering it to the carrier?" Turns out this seemingly innocuous exam question (and the suggested answers) are about to make their way to the Court of Appeal in The Hague.

A few days ago, Professor William Tetley received through the guestbook on his website the following request from a lawyer in Rotterdam (The Netherlands):

Dear Professor Tetley,

We are a Rotterdam based lawfirm and the undersigned is presently engaged in an appeal case before the Court of Appeal in The Hague. In the proceedings I am acting for the Carrier. The main topic in the proceedings is the status of a (FCL/FCL) container pursuant to the Hague Visby Rules. Our position is that if a container is provided to a Shipper and accepted (and loaded) by him, he should not

afterwards complain about the (poor) state of the container. I note from your website that this actually was a question (question 1 sub 8) of an examination paper dated 20 December 2001. The notes for possible answers are in line [with] what we are presently submitting.

Considering the foregoing I would be grateful if you could give me permission to disclose the question and answer in court. Since I have to serve submissions on Monday next, your urgent reply would be most appreciated.

Thanking him for his "interesting and novel request", Prof. Tetley agreed. Never losing his cool, he nonetheless made this conditional on one thing: that the lawyer provide proper attribution.

Now there's a hearing I would have liked to attend. ■

Prof. Tetley's guestbook can be viewed (and signed) at <http://tetley.law.mcgill.ca/guestbook/>.

Reflections and Discoveries

Individuality, motivations and communities

by Viviana Iturriaga Espinoza (Law III)

A multitude of unforeseen personal questions arose out of my last article. I was totally outweighed by their number and it took me weeks of *discovery* just to find out what it was “I wanted to say”!... Merci Fabien! As a complement to the *rubriques* on Educational Equity, the following is an honest potpourri of my personal reflections on individuality, motivations and Community.

Background

I was not always concerned with my community’s wellbeing and I guess it must have been because I didn’t relate to any community in particular and because

my own wellbeing. I was my own *terra franca*, my own community. This state was also nurtured by my dad’s long time commitment to community; to the immigrant and Christian communities. From his experiences I learnt the nasty aspects of our humanity. Yes, people do bite the hand that feeds them. Yes, people do envy goods, but they mostly envy happiness. Yes, people who work in human rights related issues can be as *salauds* as in any other field. Community work doesn’t necessarily guarantee *agape*. It should, but it doesn’t. The authenticity of the action depends on each individual motivation and integrity is a difficult, yet pre-

est inheritance. People that neglect their spiritual needs cannot comprehend for they have never truly travelled within and felt the utter fragility of our existence and accepted its corresponding dependence. The only thing some of them can do is to cowardly make fun of that which they don’t understand (see one of the issues of “Moot”). For me, Faith is my soul’s fuel and religion is foremost the teaching and lastly, the institution. The former is exercised in order for it to survive, and take me through this journey, as for the latter, the first feature guides me and sets the boundaries while the second can crumble without affecting my inner state.

It took me years to accept the fact that I did not completely belong in Quebec and that I did not completely belong there, in Chile, and that the idealised society depicted by my parents and our Chilean friends did not correspond to the supra-idea I had formed in my spirit.

my dad overworked (in my opinion) for the community (to which I developed an adverse reaction.) I found it quite challenging to grow up in a Chilean home (with rules and regulations frozen circa 1972) while living in Quebec. The dichotomy between my *educación casera* and the external living was, hummm, transsystemic. No one, except other immigrants, ever understood these curfews I had to respect or why I *vousvoyait* my parents. Seriously, it took me years to accept the fact that I did not completely belong here and that I did not completely belong there, in Chile, and that the idealised society depicted by my parents and our Chilean friends did not correspond to the supra-idea I had formed in my spirit. Where did I belong? In retrospect I find that for the longest time I belonged to myself, exclusively to myself – devoted to

cious, balancing act.

Motivations

The Communities – After accepting that I did not and could not be inserted back into the Chilean *in situ* community and that I wasn’t and could never be a 100% Québécoise (after rebelling, I understood that there were parts of my upbringing that I embraced and cherished and that I would not, for anything in the world, depart from), I pinpointed a couple of core principles and beliefs and noticed that there were people that shared them. People from here, people from there, people from everywhere. There no longer was a monolithic community but a multiplicity of communities that corresponded to my interests and beliefs.

Beliefs – My Faith is by far my great-

What does my soul have to do with this? There are “things” that fill my heart with an *indescribable* gladness and bring me peace and joy. Those are the ones I pursue. I think that if I had not learnt to take into consideration my soul I would have most probably not have been disposed to take into serious consideration, and listen to, my heart’s desires and my spirit’s aspirations. As the Ancient Greeks held, music is the art with the greatest power of mimesis, the one that can mimic the human soul, so the only mundane example I can come up with to illustrate this state is the effect of listening (among others) to Carlos Vives or Inti-Illimani. The music and the Spanish words make my blood rush with such velocity – I simply cannot ignore. How can I be indifferent to it?

Practicing Faith

Among the many Christian teachings that guide me, the one that always motivates me is that saying “God bless you” to someone in need is not good enough. If I see someone in need, it is my duty to do something. My Christian upbringing ►

also taught me to reflect on freedom and liberty as well as on obligations and exercising one's choices. I also learnt that choosing to be Christian in this century is clearly not easy and that escaping to a monastery equals cheating. This is where the balancing act of my personal integrity is the hardest, a continuous *discovery*.

When I apply my beliefs to my elected communities there is just one option: Act. However, I have discovered that the commandment isn't sufficient to bring upon the inner resolution of acting. There must be something else to assist this effort and sustain it through time, especially through adversity. I believe they are: (1) loving one's self; (2) validation; and (3) Faith.

(1) Loving one's self

We cannot give what we don't have. It starts with forgiving ourselves for our mistakes to giving ourselves what we need (material and spiritual). In order to give, our reservoirs must be full. It is tricky though because we can easily justify not giving because we don't have anything to give... And, we must also be cau-

tious and ensure we respond to our material needs through other modes such as "regular" work (other than community work), in order to prevent sliding into the extremes: corruption or dispossession.

(2) Validation

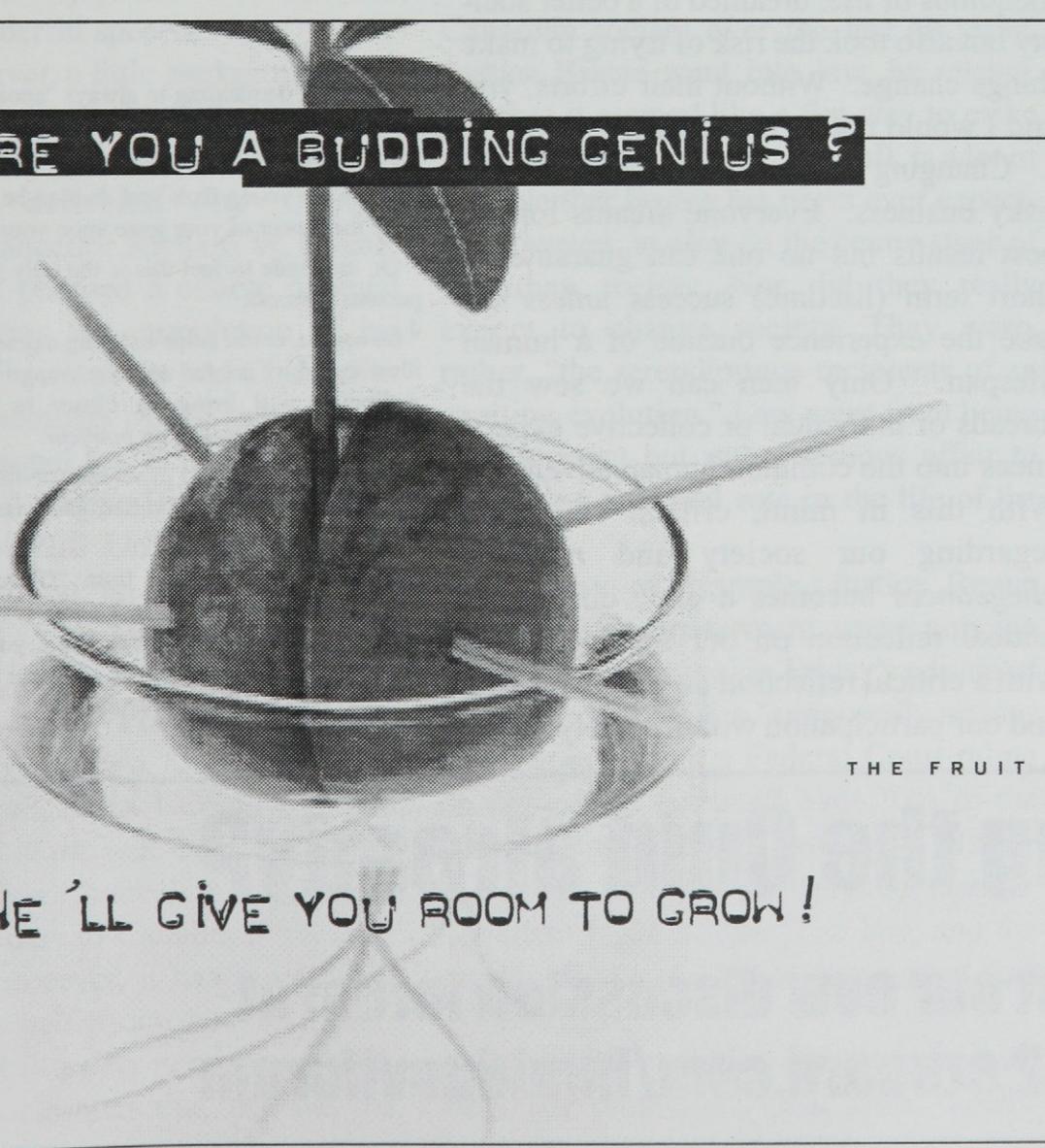
Since my dad died I discovered what a tremendous effect his validation has had on me.² Needless to say, I miss him. I owe him soooo much! The dreams and the ideals, the Faith in God, but also in me and in being true to one's self and pursuing one's dreams and convictions even if these seem rationally ill-suited. I know for a fact that he would have been very proud of me for having undertaken the Symposium but even more so for continuing studying after his departure. How much do I do for him and how much do I do for myself? I cannot easily distinguish but I do know that finding a reason to continue believing in Life could not solely be found in my inner resources. It had to come from within but it needed to find an external echo. I can love myself as much as I need but if I don't find the external validation than chances are the reservoir

will go empty and demoralisation will ensue.

(3) Faith

Faith is a very personal experience lived in the individual special relationship one has with God. Yes, God. The relationship in itself is the *raison d'être*, a project which helps us to continue believing this existence is worth living, especially when adversity comes. Life isn't easy and Life makes no sense, I know, but if it were like 365 days at the beach, believe me, we would be SO bored! So here come the difficulties. Some we invent (mostly because we're bored) and others just come along, as if we needed them... When they come, do we give up on our projects or do we continue to believe? The transposition of this exercise into the material world has helped me continue believing in it. It isn't easy but it's an effort I'm willing to undertake. I can love myself as much as I need and I can find the external validation I require but if that external validation fails or some other element disturbs the project how will I go on? ►

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Faith is the fuel, loving one's self is the warranty for genuine *agape* and validation is the external "proof" of the worthiness of our election.

To my parents' efforts I owe my Faith but also the belief in the need to struggle for a just society. Each and every contribution counts. This is our Common Human Adventure.

Our Common Human Adventure

Unless we can retrace our family history up to I don't know how many generations ago, chances are that our ancestors were *gueux* (at the most *petits bourgeois*) who had to struggled all their existences for survival – and this, for centuries. Our modern lifestyle with a relatively easy mass access to education, goods and property is unprecedented in history. All the past dreams, ideals and struggles have led us closer to the Promised Land: Liberty.

But Liberty is one heavy gift! We often confuse liberty and multiple choices and we become, *à notre insu*, consumers of goods, consumers of love, consumers of faith, consumers of rights. We break and switch allegiances whenever we feel the freedom of a choice has evaporated and left us with the seemingly depth of an obligation. Obligation, what a dreaded word! However, I find it contradictory how, in spite of our "freedom of choice," we always seem to want to tie ourselves to other obligations. For example, *la beauté* of studying law is that it is a *profession libérale* which permits us to work and earn our salary independently but "we" all want to be tied to a firm.³ It must be the subsisting need for economic security – we all need economic security. But, to what price? How many of us study law (*solely?*) for the money? How many of us will need to set aside ethical questions raised by the identity of the client? True, we must all pay our bills and choosing is

a luxury we cannot often afford. Could it be that the perceived impossibility of living this luxury of moral freedom pushes us to indulge and compensate through material luxuries that we cannot really afford?⁴ Tell me what you drive and I will tell you who you are...but then again, what good are all those trademarks⁵ we can flash if we don't even know how to hold a fork? When has money transubstantiated into class?

It seems we no longer struggle for liberty but only for economic security. Or, was that the whole buzz of the struggle after all? [...]

"Ubicatex"⁶

Then, if you and I most probably were *gueux* for centuries before we had the chance to be born in this part of the world at this period in time, can we not look back and appreciate the centuries of efforts and fights that gave birth to these new contemporary benefits? That our access to education is a novelty and that our democracy is fragile? I personally feel a profound gratitude for all the men and women who not only sensed the inequities of life, dreamed of a better society but also took the risk of trying to make things change. Without their efforts, you and I would not be here today.

Changing a system or a pattern is a risky business. Everyone dreams for the best results but no one can guarantee a short term (lifetime) success *unless* we take the experience outside of a human lifespan. Only then can we sew the threads of individual or collective experiences into the common human adventure. With this in mind, critical reflection regarding our society and multiple *allégeances* becomes a civic duty. But critical reflection on our society begins with a critical reflection on our own being and our participation within society, in the

prevailing system and in the Community.

Not knowing if the personal efforts and time we decide to devote to the realisation of a dream are worth the while, we are instinctively pushed to give up. It is understandable yet so easy! However, there is this little part of me that continues to believe, despite the difficulties, that this existence is worth living beyond my personal material, fungible needs. It might be a result of my Protestant upbringing or the result of my Mediterranean gene mix – *no lo sé* – I just know I always finds things to criticise and that instead of always be complaining I should do something about it! Will my dreams bear fruit? *No lo sé. A lo mejor que sí, a lo mejor que no.* Will I regret all the efforts and time I have deployed? Here again, *no lo sé*. But I do know that **presently**, these dreams propel me forward and give me a sense of being useful and a sense of accomplishment.

I continue working on balancing my love of silk, leather and glittery things with my aspiration to make of these present studies more than a *gagne-pain*, a vocation... ■

¹ It's really demanding to always "speak" or in this case "write" to convey a structured message. This text is not really structured; it's a simple mental flow of reflections.

² To all the young dads and dads-to-be, never underestimate the power of your gaze upon your daughters!

³ Or, are made to feel this is the only path available for personal success.

⁴ Of course, credit helps in living a prosperous economic illusion and we are fed with the mirage that our monetary wellbeing will bring us closer to the prerequisite *épanouissement garant du bonheur*.

⁵ Thank god for logos! If we cannot distinguish the quality of beautifully handcrafted garments at least we can recognize the logo...

⁶ Chilean slang derived from "Ubicar" (Ubicarse: to locate oneself) defining a self-test (?) for knowing our place in a defined time. For example, you raise your voice while speaking to a professor someone will say *jubicate!* Or "this person has no *ubicatex*."

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FEATURE

The View from the Bench: Mr. Justice Binnie Addresses and Inspires McGill Law

by Jason MacLean (Law I)

Mr. Justice William Ian Corneil Binnie addressed the McGill Law Faculty last Friday on the political and legal challenges facing the Supreme Court from the view of the bench.

While Justice Binnie's talk was well attended, it is a pity that the Moot Court was not filled to its capacity for his most inspiring address. In what follows I will do my best to reproduce as faithfully as possible both the contents and the spirit of Justice Binnie's remarks for everyone's edification and enjoyment. It was, quite simply, a wonderful speech.

First, however, a little background. Mr. Justice Binnie is a McGill University alumnus. As we learned from the witty introduction delivered by McGill University Chancellor Richard W. Pound, Justice Binnie pursued a course of legal studies following the completion of his B.A. at McGill (where he and Chancellor Pound were members of the same fraternity) at "a regional law school located to the west of us." Justice Binnie is also the recipient of McGill University's highest form of recognition, an Honorary Doctor of Laws.

Mr. Justice Binnie began his speech by matching Chancellor Pound's rapier wit and then raising him two. "I wish," Justice Binnie remarked, "that I could tell you that your hard work will carry you from your seats in New Chancellor Day Hall to the Supreme Court of Canada. If my case is any guide, however, it has more to do with shameless self-promotion." An individual as humble as he is accomplished, Justice Binnie claimed that his success

has had more to do with being buoyed by a rising tide, something he claims to have neither worked for nor anticipated.

Regarding political and legal challenges as viewed from the bench, Justice Binnie quipped that if he addressed politics, he would likely be impeached. He went on to say that, as far as legal challenges are concerned, he should let the judgments speak for themselves. In effect leaving only the view from the bench, such as it is!

Humour aside, Justice Binnie proceeded to discuss the evolution of law in Canadian society over the last 40 years. Justice Binnie went into law, he related, because it seemed like a fun way to make a living. Being in court, after all, is a lot of fun. Neither he nor his peers ever expected, however, to play on the centre stage of Canadian society. Nor did they really expect to change society. They were, rather, "the serendipitous recipients of an exciting evolution." Law went from being an important but rather tedious affair to occupying a central role in the life of the country.

By way of example, Justice Binnie conveyed his amazement upon noticing that the lead editorial in Friday's edition of the *Globe and Mail*, a "supposedly serious newspaper," about a Federal Court ruling on copyrights occupied over 70% of the editorial page. Such coverage, Binnie noted, is absolutely unprecedented in Canadian legal culture. The law, and the courts, all of a sudden matter a great deal to Canadians.

But if this evolution did not stem from the legal profession, then from where?

Justice Binnie argues that the flowering of human rights, and Canada's decision to make human rights a central aspect of its culture, explains the new importance of the law in the lives of ordinary Canadians.

This, too, was an unexpected development. As Justice Binnie recalls, few people in the Canadian government in 1980 expected much of the Charter. The courts had all but vitiated the Bill of Rights, with the arguable exception of *Drybones*. Trudeau's project, however, was a political project. The *Canadian Charter* was intended to undermine the perception that the law that pertained to real, everyday life was in the main provincial law. Slowly, the courts began to recognize the importance of the Charter, such that at the present moment, according to Justice Binnie, the Charter is the "glue" of Canadian culture and identity. In this regard Justice Binnie quotes approvingly the Canadian political philosopher Michael Ignatieff: "rights, not roots; values, not origins" hold the country together.

Of course the Charter, and the courts, must have limits. Justice Binnie recounted his role as counsel for the federal government in the case of *Operation Dismantle*. Justice Binnie argued before the Supreme Court that the judiciary must limit itself to problems it can competently solve. What, after all, do the courts know of cruise missiles and national security? Justice Binnie drew as a litigant upon the Political Questions doctrine of American constitutional law which articulates both a separation of powers and a judicial restraint rationale for limiting the scope of judicial review of political matters.

Justice Binnie's argument was, of course, ultimately rejected by Madame Justice Wilson, who, in her learned reasons, argued that the question was not whether the court *can* competently review political matters but whether it *must*. Evidently Madame Justice Wilson was not convinced by the logic of Justice ▶

Binnie's submission that if a court cannot competently judge a matter then perhaps it should not review that matter at all.

The public reaction to the decision is instructive. The headline in the Ottawa Citizen read "Charter Binds Cabinet," and the spin was positive. Things, however, have since changed. Justice Binnie noted by way of example the title of a recent book on the courts entitled *The Most Dangerous Branch*. Who, Justice Binnie asked rhetorically, will save us from the tyranny of the judges, who have been likened to the four horsemen of the apocalypse: slaughter, famine, disease, and death. Who indeed?

How to put this somewhat exaggerated set of concerns into proper perspective? Justice Binnie argues, from the view of the bench, that judicial activism is in the eye of the beholder. A written constitution, after all, demands interpretation, and constitutional interpretation is a bottomless doctrinal pit. Judicial review, then, has been the norm in Canada since 1867. True, Justice Binnie remarked, the scope of Charter interpretation far exceeds the division of powers analysis of sections 91 and 92 of the BNA act, but the courts have nonetheless always been in the business of striking down legislation, and they have always taken public policy into account in so doing.

Regarding the diagnosis of the "disease" of judicial activism, Justice Binnie recounted the famous *Persons Case* of the 1930s. The Supreme Court of Canada argued that because the BNA act did not countenance the possibility of women holding public office, the court argued that the original framers of the constitution did not intend women to become members of the Senate, either. The Privy Council, however, overturned the Supreme Court's ruling, arguing that the constitution is not statically limited to its original construction but is rather a living tree. Thus did the court breathe life into the dusty, antiquated bones of its society.

What, then, of death, or the idea that we have reached the end of something hitherto considered very valuable (judicial restraint)? Change, Justice Binnie argued, is always risky, and therefore must be managed carefully. Looking ahead to

2004, what appears to be revolutionary now will look hopelessly outdated to our predecessors.

Justice Binnie urged the importance of change and renewal by recounting two instances that evinced glimmers of the law's reforming capacity. Justice Binnie first recounted the success enjoyed by former McGill Law professor Frank Scott in arguing the *Roncarelli* case in limiting abuses of governmental power.

Justice Binnie proceeded to discuss a still earlier example, that of the efforts of United States Supreme Court Justice Robert H. Jackson at the Nuremberg War Crime Trials. Justice Jackson took a leave of absence from the court to serve as the chief U.S. prosecutor at Nuremberg. Justice Jackson's famous and moving closing address (which is available online at www.roberthjackson.org/theman2-7-8-2.asp) lifted, in the view of Justice Binnie,

the notion of personal responsibility during absolutely horrendous times to a notion of moral and legal responsibility that people could understand. Working with ideas, Justice Jackson constructed a notion of justice that now finds an expression at The Hague and other high courts throughout the world. If law has emerged as an animating force in society, Justice Binnie argues, it is because the law is driven by powerful ideas.

Whereupon Justice Binnie concluded where he, and we, began - on the edge of our seats. Rather than lapse into a comfortable past, we must instead seek out and join the predominant developments of our times. We can make a difference in both Canadian and Global society if we are willing to take risks and move with the times. McGill Law could not have hoped for a more timely, more learned, more inspiring message! ■

McGill en met plein la face aux facultés francophones

par Pierre-Olivier Savoie (Law III)

Robert Boyd et Jean-Philippe Dallaire, deux de nos collègues de première année, ont représenté notre faculté avec brio à la 10e finale provinciale du concours oratoire Face à Face. Ils ont remporté le prix Borden Ladner Gervais de la deuxième meilleure équipe. C'est la paire de l'université de Sherbrooke qui a remporté les grands honneurs, mais messieurs Boyd et Dallaire n'ont pas eu la chance de les affronter dans ce tournoi à la ronde de deux matchs. Les autres équipes présentes étaient l'UQAM, l'université Laval et l'université de Montréal.

Dans leur premier match, ils ont vaincu l'université de Montréal dans un débat sur l'interdiction de porter des symboles religieux en milieu scolaire.

De leur second affrontement, contre l'université Laval, ils sont aussi sortis vainqueurs en argumentant contre les primes au rendement au travail. Ils ont ébloui la galerie avec un argument basé sur des études de relations industrielles démontrant que les employés pouvant obtenir des primes de rendement

prennent plus de risques afin d'être plus productif. Ce qui peut dégénérer. Citant à l'appui l'ancien vice-président de la banque mondiale, Joseph Stiglitz, ils ont souligné comment les options d'action au rendement et d'autres carottes pour pdg ont mené aux abus dont Enron ne fut que la pointe de l'iceberg.

Il semble maintenant que la 11e édition du concours Face à Face pourrait bien être organisée l'an prochain par les trois associations des facultés montréalaises. Il semble aussi que notre Moot Court soit considéré comme un endroit digne de tenir un tel concours.

Les autres facultés ont une tradition d'organiser des rondes préliminaires pour sélectionner les orateurs qui iront à la finale provinciale plutôt que de d'ordonnancer le contingent plaideur en se fiant au *deliberate resort to chance*, comme ce fut le cas ici cette année. Même si cela a donné d'excellents résultats, une série de débats oratoires en français au cours de l'année pour sélectionner notre contingent ne pourrait être que sympathique pour l'ambiance à la faculté. ■

Quotes

collected by Philippe de Grandmont (IASL)

Our dear professors: we like them because of the unfathomable reservoirs of knowledge they incarnate, always willing to quench our thirst for truth, pushing further our abilities of legal reasoning. Or so we should... but let's face it: often we like them simply because they are witty, funny or just verbally clumsy. So here it is, a small hit-parade of utterances made by some of McGill Law's best since last September:

"They resorted to the preferred means for reaching decisions within the International Telecommunications Union: consensus by exhaustion."

"There are only three aspects of employment airline pilots are really interested in: seniority, salary and sex. Not necessarily in that order."

"These companies have an empty office with a phone, and to answer that phone they hire from one of those services that rent girls... secretaries I mean!"

"Italians are very good drivers. Fast but good. Those who aren't good are dead."

"When the rocket boosters are ignited, the guy who took the decision not to insure that satellite component doesn't have any nails left. Both hands. And toes too."

"Now we get to the subject that makes Bill Tettley's hairs fall out. Both of them."

"In common law there is no duty to render assistance. Your neighbour's house could be burning down, and you could just take out your marshmallows!"

"To my knowledge this applies in almost all countries – though I don't check the laws of Lithuania everyday."

"Imagine my surprise: there I was in Nairobi, thousands of kilometres away from Montreal, stumbling on my neighbour who lives down the street. Imagine my surprise further when I noticed that his wife, whom I knew well, was not the woman holding on to his arm at that moment."

"Because it was not refrigerated, the cargo of bananas went bananas."

"After the accident, the plaintiff lost the desire to socialize with her husband. You know, many people also experience that after a certain number of years of marriage..."

"To solve that problem, who do you turn to? The guys with the slide rulers and the pocket protectors: the engineers."

"The Irish Sea is a hotbed of cold fog."

Générique de fin Ending Credits

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Thanks for your support - see you in September!